



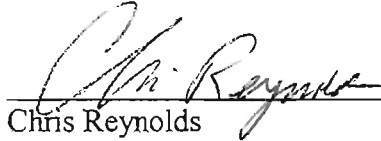
DEBRA BOWEN | SECRETARY OF STATE
STATE OF CALIFORNIA | ELECTIONS

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October 11, 2007

TO: All County Clerks/Registrars of Voters (07173)

FROM:


Chris Reynolds
Deputy Secretary of State, HAVA Activities

SUBJECT: **ES&S Public Hearing Report and Agenda**

Attached please find a copy of the Election Systems & Software, Inc. (ES&S) Public Hearing Report and Agenda for the public hearing set for Monday, October 15, 2007, 10:00 a.m., in the Secretary of State's Office 1st Floor Auditorium, 1500 11th Street, Sacramento, California.

The purpose of the public hearing is to give ES&S and interested persons an opportunity to express their views regarding the Secretary of State's intention to seek relief against ES&S for selling and deploying modified AutoMARK devices without prior written notice to the Secretary of State, as required by law, and without a determination having been made by the Secretary of State that the change or modification does not impair the accuracy and efficiency of the AutoMARK sufficient to require a reexamination and re-approval of the AutoMARK or the voting system of which it is a part.

Although the Public Hearing Report makes note of specific forms of relief available under Elections Code Section 19214.5, the Report should not be read as a decision by the Secretary of State as to which form or forms of relief to seek.



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Public Hearing Report

ES&S AutoMARK
October 15, 2007
10:00 a.m.

1500 11th Street
1st Floor Auditorium
Sacramento

EXECUTIVE SUMMARY

Secretary of State Debra Bowen recently completed an unprecedented top-to-bottom review of voting systems certified for use in California.¹ The Secretary contracted with the University of California to assess the security, accuracy, reliability and accessibility of the certified systems during an intensive two-month review.

One of the major voting system vendors, Election Systems & Software, Inc. (ES&S), chose *not* to submit its ES&S Optical Scan voting system to the top-to-bottom review. The ES&S Optical Scan voting system was originally certified August 3, 2005. One of the components of the voting system is a ballot-marking device accessible to voters with disabilities, called AutoMARK A100, with firmware version 1.0.

ES&S stated that instead of submitting its currently certified system to the top-to-bottom review, it would submit a new version of its optical scan system to the Secretary of State for certification in 2007. ES&S's new voting system is called Unity 3.0.1.1, and one of its components is a new AutoMARK ballot-marking device, called AutoMARK A200, with firmware version 1.1.2258. In the course of communicating with ES&S about its new certification application, ES&S disclosed to the Secretary of State's office that it had *already sold* 972 units of the AutoMARK A200, to five California counties in 2006. Assuming ES&S's statement is correct, this action would be in violation of California Elections Code §18564.5 and §19213, which specifically require voting system vendors to notify the Secretary of State in writing and to wait for Secretary of State approval before deploying any changes or modifications to certified voting systems used in California.

The counties that unknowingly bought the 972 AutoMARK A200 machines – Colusa, Marin, Merced, San Francisco, and Solano counties – began using the machines in their elections as early as June 2006.

¹ For background information, final reports, and decertification/recertification decisions of the top-to-bottom review, go to http://www.sos.ca.gov/elections/elections_vsr.htm.

In August 2007, Secretary of State Bowen announced her intention to hold a public hearing to gather facts, hear comments from the public, and eventually decide whether to initiate an enforcement action against ES&S for violations of Elections Code §18564.5 and §19213, which could result in the imposition of civil penalties and a damage award in excess of \$9.7 million. Secretary Bowen also has the power, under Elections Code §19214.5, to seek a refund of an estimated \$5 million in payments the five counties made to ES&S to buy the equipment.

CALIFORNIA LAW

State Certification Required for All California Voting Systems

California Elections Code §19201(a) requires all voting systems to be certified by the Secretary of State before use in elections.

Vendors Must Notify the Secretary of State and Wait for Approval of Any Changes or Modifications to Voting Systems

Elections Code §18564.5 provides that the Secretary of State, the Attorney General, and local elections officials have the power to seek penalties against anyone who:

- “Knowingly, and without authorization, inserts or causes the insertion of uncertified hardware, software, or firmware, for whatever purpose, into any voting machine, voting device, voting system, vote tabulating device, or ballot tally software.” Elections Code §18564.5(a)(5).
- “Fails to notify the Secretary of State prior to any change in hardware, software, or firmware to a voting machine, voting device, voting system, or vote tabulating device, certified or conditionally certified for use in this state.” Elections Code §18564.5(a)(6).

Elections Code §19213 also requires voting system vendors to notify the Secretary of State in writing and obtain prior approval for any changes or modifications to certified voting systems:

- “When a voting system or part of a voting system has been approved by the Secretary of State, it *shall not be changed or modified* until the Secretary of State has been notified in writing and determined that the change or modification does not impair its accuracy and efficiency sufficient to require a reexamination and reapproval... .” (*Emphasis added.*)

Secretary of State Has the Power to Seek Monetary Damages, Refunds, Penalties, and Injunctive Relief

Under California law, the Secretary of State has the power to seek, among other things, monetary damages, refunds, penalties, and injunctive relief against any vendor who fails to notify the Secretary of State and receive Secretary of State approval before changing or modifying a certified voting system.

Elections Code §19214.5(a) provides the following remedies:

- (1) Monetary damages from the offending party or parties, not to exceed ten thousand dollars (\$10,000) per violation. For purposes of this subdivision, each voting machine found to contain the unauthorized hardware, software, or firmware shall be considered a separate violation. Damages imposed pursuant to this subdivision shall be apportioned 50 percent to the county in which the violation occurred, if applicable, and 50 percent to the Office of the Secretary of State for purposes of bolstering voting systems security efforts.
- (2) Immediate commencement of decertification proceedings for the voting system in question.
- (3) Prohibiting the manufacturer or vendor of a voting system from doing any elections-related business in the state for one, two, or three years.
- (4) Refund of all moneys paid by a locality for a compromised voting system, whether or not the voting system has been used in an election.
- (5) Any other remedial actions authorized by law to prevent unjust enrichment of the offending party. Elections Code §19214.5(a)(1)-(5).

Before seeking relief under §19214.5(a), Elections Code §19214.5(b) requires the Secretary of State to hold a public hearing upon 30 days advance notice.

In addition, Elections Code §18564.5 provides that the Secretary of State, the Attorney General, and local elections officials have the power to seek penalties of **\$50,000 per act** against anyone who “knowingly, and without authorization, inserts or causes the insertion of uncertified hardware, software, or firmware, for whatever purpose, into any voting machine, voting device, voting system, vote tabulating device, or ballot tally software” or who “fails to notify the Secretary of State prior to any change in hardware, software, or firmware to a voting machine, voting device, voting system, or vote tabulating device, certified or conditionally certified for use in this state.”

The remedies set forth above were established by SB 1376 (Perata), Chapter 813, Statutes of 2004. SB 1376 was enacted in response to a 2004 Secretary of State report revealing that Diebold Election Systems, Inc. had deployed voting system components that had not

been certified. Separately, the 2004 report also found that Diebold had installed uncertified software in existing Diebold voting systems used in 17 California counties.

FACTUAL BACKGROUND

ES&S AutoMARK A100, with Firmware Version 1.0

The ES&S AutoMARK A100, Version 1.0, is an electronic ballot-marking device, which is one component of the ES&S Optical Scan voting system that was certified for use in California on August 3, 2005.

According to information provided by the counties to the Secretary of State, 14 counties use the AutoMARK ballot-marking device to comply with the federal Help America Vote Act (HAVA) requirement to provide at least one machine in each polling place to enable voters with disabilities to cast ballots independently. Those counties are:

- Amador
- Calaveras
- Colusa
- Contra Costa
- Marin
- Merced
- Sacramento
- San Francisco
- San Luis Obispo
- Santa Barbara
- Siskiyou
- Solano
- Stanislaus
- Tuolumne

ES&S AutoMARK A200, with Firmware Version 1.1.2258

The ES&S AutoMARK A200, Version 1.1.2258, ballot-marking device contains both hardware and firmware modifications from the AutoMARK A100, Version 1.0. “A200” signifies the hardware model, which indicates a change from the AutoMARK A100 model. “Version 1.1.2258” signifies the version of firmware on the device, and indicates a change from the AutoMARK A100, which was certified by a prior Secretary of State with version 1.0 firmware.

According to information ES&S provided to the Secretary of State in July 2007, five of the 14 counties listed above actually received from ES&S the AutoMARK A200, instead of the certified AutoMARK A100.

According to ES&S, it delivered 972 AutoMARK A200, machines to five counties in 2006 as follows:

Colusa County	20 machines
Marin County	130 machines
Merced County	104 machines
San Francisco City & County	558 machines
Solano County	160 machines
Total	972 machines

The AutoMARK A200 machines had **neither state nor federal certification** when ES&S delivered them to California elections officials for use in elections in 2006.

Chronology

According to information gathered to date by the Secretary of State's office, the following events relate to the investigation of ES&S's violation of California law.

June 1, 2005. The AutoMARK voting system, including the AutoMARK A100, Version 1.0 ballot-marking device, received federal certification (NASED #N-1-16-22-12-001).

August 3, 2005. The ES&S Optical Scan voting system, including the Unity 2.4.3 Election Management System and the AutoMARK A100, Version 1.0, ballot-marking device, was certified for use in California by then-Secretary of State Bruce McPherson.

March-August 2006. ES&S delivered 972 AutoMARK A200 machines to five California counties.

August 31, 2006. ES&S received federal certification for the Unity 3.0.1.1 voting system. This certification included approval for both A100 and A200 units with Version 1.1.2258 firmware (NASED # N-2-02-22-22-006).

August-September 2006. The Secretary of State's office conducted a volume test of 100 AutoMARK ballot-marking devices containing Version 1.1.2258 firmware as part of an ES&S application for California certification of its new Unity 3.0.1.1 voting system. Numerous serious errors were identified, and ES&S subsequently withdrew its application for certification of the new system.

July 11, 2007. Secretary of State staff conducted a conference call with ES&S regarding its application for state certification of the Unity 3.0.1.1 voting system, including the AutoMARK A200, Version 1.1.2258. During the call, an ES&S employee stated that ES&S had submitted for testing both AutoMARK A100 and A200 units with Version 1.1.2258 firmware in August-September 2006. The Secretary of State's office was not aware of the existence of two hardware models before this statement. The same ES&S employee then stated that the reason ES&S had submitted both the AutoMARK A100 and A200 (referring to them as "Phase I and Phase II") for testing in the fall of 2006 was

because ES&S had deployed both models in California. On the conference call, Secretary of State staff asked ES&S if it could provide a confirmation of how many of each version (A100 or A200) had been deployed in California as well as a complete list of counties detailing how many A100 or A200 machines each county received.

July 17, 2007. ES&S sent the Secretary of State a graphic outlining the differences between the A100 and A200 models.

July 23, 2007. ES&S sent the Secretary of State an e-mail containing a spreadsheet showing ES&S had in fact delivered 972 AutoMARK A200 units to five California counties.

July-August 2007. Secretary of State staff undertook independent investigative activities to confirm the ES&S July 11, 2007, verbal statement that it had deployed both A100 and A200 units in California.

The Secretary of State's investigative efforts will continue up to and following the October 15, 2007, public hearing.



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Public Hearing Agenda

Election Systems & Software, Inc.
October 15, 2007
10:00 a.m.

1500 11th Street
1st Floor Auditorium
Sacramento

- I. Introductory Remarks
- II. Secretary of State Report on the following voting system:
 - a. Election Systems & Software, Inc. (ES&S) Optical Scan Voting System
- III. Voting System Vendor Response to Reports
- IV. Public Comment Period
- V. Adjournment

Auditorium doors open at 9:30 a.m. Anyone wishing to provide oral comment at the hearing must complete a speaker's card upon arrival. Each speaker during the public comment period will be allotted three minutes for a presentation. Anyone wishing to submit written testimony can do so by delivering it to the hearing or by e-mailing it to votingsystems@sos.ca.gov.